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NO. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ELLA MAE WELLS, ET AL.

Petitioners,

V.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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QUESTION PRESENTED FOR REVIEW

Does evidence that conduct challenged under the Federal Tort Claims Act turned on application of scientific standards suffice to defeat a motion to dismiss on the pleadings on discretionary function exception grounds?

LIST OF ALL PARTIES

ELLA MAE WELLS and SHELLEY WELLS, Individually and As Next of Friend for FRANCINE WELLS; DAVID WELLS; MICHAEL WELLS; MICHELLE WELLS; LENA HAYES, Individually and Next of Friend for NATHAN HAYES and KELVIN HAYES; KATHY HOWARD, Individually and as Next of Friend for GE-ROY HOWARD and GERSHWIN HOWARD; OPHILIA GARNER, Individually and Next of Friend for SHARONDA GARNER, TIMOTHY GARNER and TYSON GARNER; CLARICE BATES, Individually and Next of Friend for PAULA BATES, CHRIS BATES, VALERIE BATES and SHANTAE BATES; DEBORAH SEALES, Individually and as Next of Friend for GERADETTE GILL; LIMMIE FREEMAN and GEORGIA FREEMAN, Individually and as Next of Friends for DARLENE FREEMAN, LYNELL FREEMAN and VALERIE FREEMAN; LESTER FREEMAN; PATRICIA SPEARS, Individually and as Next of Friend for ARIC DEMINGS, PATARICK DEMINGS, LISA DEMINGS; BERNICE WASHINGTON, Individually and as Next of Friend for DEONZA POLK, LEONARD WASHINGTON, WILLIAM D. POLK and DEBRA POLK; HELEN HUNT, Individually and as Next of Friend for TIFFANY HUNT, KEITH HUNT, ERIC HUNT, JOSEPH HUNT and VINCENT HUNT; EMMA BRYANT, Individually and as Next of Friend for CRAIG CARPENTER, ANITHA WILLIAMS, SHARION WILLIAMS, TAMMYE WILLIAMS and JAMES WILLIAMS; ANNIE CHALMERS, Individually and as Next of Friend for BRUCE CHALMERS, WENDALL CHALMERS, EMMETT CHALMERS and VERONICA CHALMERS; CAROLYN TATUM, Individually and as Next of Friend for BYRON TATUM, CHATONYA TATUM and ERIC TATUM; SHERRY JONES, Individually and as Next of Friend for CARWIN JONES, UNAKA JONES and ZERICK JONES; JOHNNY COLEMAN and PATRICIA COLEMAN, Individually and as Next of

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and as Next of Friend for KIZZY SHERMAN and SHERRY SHERMAN; ABBIE WILKINS, Individually and as Next of Friend for KENNETH TATE, REGINALD TATE and ADRIAN WILKENS; ANEDRA THOMAS, Individually and as Next of Friend for RANDY THOMAS and TENIQUA THOMAS; IDA MAE WEST, Individually and as Next of Friend for BEVERLY WEST, ROBERT WEST and TERRY WEST; KAREN YOUNG, Individually and as next of Friend for ANTONIO YOUNG; CONNIE SPENCER, Individually and as Next of Friend for TARINA SPENCER and TAMELA SPENCER; FAYETTE GUILDER, Individually and as Next of Friend for DEGUAYAN GULDER; JERROLD WARREN, Individually and as Next of Friend for JERANDRIAN WARREN; DORICE THOMAS, Individually and as Next of Friend for BRODERICK THOMAS and MARGARET ADAMS and MACK ADAMS, Individually and as Next of Friend for LADUNNIA ADAMS, are Petitioners in this Court and were Appellants in the court below.

The United States of America is Respondent here and was Appellee below.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is published at 851 F.2d 1417 (D.C. Cir. 1988). The opinion of the district court is published at 655 F.supp. 715 (D.D.C. 1987).

STATEMENT OF JURISDICTION

The judgment and opinion of the court of appeals were entered on July 19, 1988. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

1. 28 U.S.C. §1346(b):

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2. 28 U.S.C. §2680(a)

> The provisions of this chapter and §1346(b) of this title shall not apply to
>
> (a) any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or

STATUTES INVOLVED (Continued)

perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

STATEMENT OF THE CASE

As this action was dismissed before the development of any factual record, the following allegations, taken from Plaintiffs' complaint and reflecting information known to them, must be accepted as true.

Plaintiffs are residents of low-income neighborhoods in West Dallas. For years, three lead companies operated smelters in the heart of these neighborhoods. The housing projects in which Plaintiffs lived were downwind from the smelters; one project was directly downwind from the largest lead recycling plant in the world. These smelters were for decades responsible for levels of lead emissions substantially in excess of any level considered to be safe. As a consequence, Plaintiffs sustained staggering exposure to lead (primarily through the air and soil) resulting in severe contamination. This contamination is reflected in seriously elevated levels of lead in a person's bloodstream. Resultant brain damage and developmental impairments have produced lifelong debilitating effects.

Several years before these claims were filed, the Environmental Protection Agency had undertaken a study of the lead pollution problems in West Dallas housing projects and was in possession of information indicating the scope and magnitude of the hazard and the effects already being documented. The unfortunate history of EPA's callous indifference to the health of those whose mission it is to protect and whose safety it had undertaken to guard is best detailed in *Hazardous Waste Contamination of Water Resources (EPA Implementation of the Superfund Program & Lead Pollution Problems in Dallas, Texas); Hearings Before the Subcommittee on Investigation and Oversight of the House Comm. on Public Works and Transportation*, 98th Cong., 1st Sess. (1983). These hearings reveal that RSR

corporation, one of the three companies operating lead smelters in Dallas, had made a commitment in writing to "do whatever it took to alleviate the problem." Statement of Fran Phillips, EPA Deputy Regional Administrator, at 310 (JA-122). Instead of accepting RSR's cleanup commitment, however, Dr. John Hernandez, EPA Deputy Administrator, rejected the offer and ordered 18 months of additional blood-level testing. Hearings, passim. There was overwhelming evidence that the standard of 1000 parts per million—the standard that Deputy Administrator Hernandez felt needed more study and was too stringent to base a cleanup program on—was in fact widely viewed as too lax. Hearings at 323. The 18 months of additional study that Dr. Hernandez called for did not answer the single question it was ordered for. Hearings at 348, statement of Norman Dyer, Ph.D, Chief, Pesticides and Toxics Branch, EPA.

Finally, all four of Dr. Hernandez' subordinates from the Dallas office testified that, in their opinion, his actions were not "based upon anything other than his scientific judgment." Hearings at 339. Dr. Hernandez himself testified that his decisions turned on risk level and exposure route data. *Id.* at 67.

Plaintiffs first filed administrative claims with the EPA for damages, as required by the Federal Tort Claims Act, 28 U.S.C. §§1346, 2671 et seq. (1982); see 28 U.S.C. §2675(a). It is disputed whether a small minority of Plaintiffs validly fulfilled the administrative claims procedure. In any event, Plaintiffs' claims were denied. Plaintiffs then filed this action in the United States District Court for the District of Columbia.

Asserting primary claims were approximately 370 children with health and developmental problems attributed to lead exposure. Many parents were also plaintiffs. The Government moved to dismiss the claims under Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction, and Rule 12(b)(6) for failure to state a claim upon which relief could be granted. It contended that the district court was without jurisdiction under the FTCA because two exceptions to the general waiver of sovereign immunity, the "discretionary function" exception and the misrepresentation exception, 28 U.S.C. §§2680(a) and (h), barred Plaintiffs' claims; the Rule 12(b)(6) pleading urged that Plaintiffs' complaint did not state a cause of action under controlling Texas law. The district court granted dismissal on the grounds that the discretionary function and misrepresentation exceptions barred suit; it made no finding on whether Plaintiffs stated a claim under Texas law. *Wells v. United States*, 655 F.Supp. 715, 719 (D.D.C. 1987).

The court of Appeals affirmed solely on the basis of the discretionary function exception. *Wells v. United States*, 851 F.2d 1471, 1472 (D.C. Cir. 1988). This petition followed.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH ESTABLISHED PRECEDENT REGULATING DISMISSAL AT THE PLEADING STAGE

A. The Discretionary Function Exeption Protects Only Public Policy Judgments

This Court has thrice considered the effect of the "discretionary function exception" on suits against the United States for tort damages. Each time, the Court has concluded that only conduct that involves the formulation of public policy–social, economic or political decisionmaking–is insulated from judicial scrutiny.

In *Dalehite v. United States*, 346 U.S. 15 (1953), plaintiffs charged the Government with negligence in various aspects of a program of production and distribution of ammonium nitrate fertilizer. In holding the claims barred, the Court made clear that the challenged decision must reflect a determination involving policy. It wrote:

> The discretionary function or duty that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications, or schedules of operations. ***Where there is room for policy judgment, there is discretion.***

Id., 346 U.S. at 35-36 (emphasis added). Thus, while all governmental officials have "discretion," in the literal sense of the word, to act one way or another, their choices are protected only if policy judgments are involved.

The Court again considered the exemption in *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984). In *Varig*, plaintiffs sued for harms suffered when an airplane crashed because of violations of FAA safety regulations. Plaintiffs challenged the FAA's decision to employ a spot check system of inspecting aircraft for compliance with regulations.

The Court first held that the rank of the governmental official involved is immaterial; it is rather the "nature of the conduct" at issue that is important. *Id.*, 467 U.S. at 813. In other words, even a low-ranking subordinate may make decisions protected by the discretionary function exception. Whatever the official's status, however, his conduct is immune from suit only if a policymaking determination is involved. The Court continued:

> This emphasis upon protection for regulatory activities suggests an underlying basis for the inclusion of an exception for discretionary function in the Act: *Congress wished to prevent judicial "second guessing" of legislative and adminstrative decisions grounded in social, economic, and political policy through the medium of an action in tort*. By fashioning an exception for discretionary governmental functions, including regulatory activities, Congress took "steps to protect the Government from liability that would seriously handicap efficient government operations." *United States v. Muniz*, 374 U.S. 150, 163, 83 S.Ct. 1850, 1858, 10 L.Ed.2d 805, 815 (1963).

Id. at 674-75 (emphasis added). *Dalehite* and *Varig* thus teach that governmental decisions "grounded in social,

economic, and political policy" are the decisions immune from judicial scrutiny. The Court in *Varig* took pains to clarify this assessment of the exception:

> Here, the FAA has determined that a program of "spot-checking" manufacturers' compliance with minimum safety standards best accomodates the goal of air transportation safety and the reality of finite agency resources. *Judicial intervention in such decision making through private tort suits would require the courts to "second-guess" the political, social and economic judgments of an agency exercising its regulatory function. It was precisely this sort of judicial intervention in policymaking that the discretionary function exception was designed to prevent.*

Id. at 678 (emphasis added).

Finally, in *Berkovitz v. United States*, _____ U.S. _____, 108 S.Ct. 1954 (1988), this Court reviewed claims that the Bureau of Biologics of the Food and Drug Administration wrongfully approved release to the public of a contaminated lot of polio vaccine. The principle was reiterated that "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies." 108 S.Ct. at 1958.

Most importantly, it is now clear from *Berkovitz* that scientific decisions made by Government employees are fully actionable. In the present case, we relied heavily in the court below upon *Griffin v. United States*, 500 F.2d 1059 (3d Cir. 1974), for the proposition that scientific judgments, unencumbered by policymaking, are entirely subject to tort review. See 500 F.2d at 1066 ("Where the conduct of Government employees in implementing agency regulations

requires only performance of scientific evaluation and not the formulation of policy, we do not believe that the conduct is immunized from judicial review as a 'discretionary function' "). The Third Circuit's opinion in *Berkovitz* was cited by the Government in its brief to the effect that *Griffin* was no longer good law and that its holding concerning scientific decisions was wrong.

Berkovitz, however, makes plain that scientific decisions are perfectly amenable to Tort Claims Act suits. In discussing one of plaintiffs' allegations in *Berkovitz*, the Court holds that scientific choices are outside the exception:

> In that event, the question turns on whether the manner and method of determining compliance with the safety standards at issue involves agency judgment of the kind protected by the discretionary function exception. Petitioners contend that the determination involves the application of objective scientific standards, see Brief for Petitioners 16-17, whereas the Government asserts that the determination incorporates considerable "policy judgment," Brief for United States at 36. In making these assertions the parties have framed the issue appropriately; application of the discretionary function exception to the claim that the determination of compliance was incorrect hinges on whether the agency officials making that determination permissibly exercise policy choice.

Id., 108 S.Ct. at 1954.

Ordinary scientific decisionmaking does not fall within the discretionary fuction exception. In the instant case, Plaintiffs/Appellants produced substantial evidence that nothing but science was involved in the decisions concerning lead hazards cleanup and enforcement in Dallas. This evidence was detailed in briefing in both lower courts and includes identification by the EPA Acting Administrator of the epidemiological factors guiding his actions and the admissions by four subordinates that his actions were based on "nothing other than his scientific judgment."

Particularly in the context of a motion to dismiss, Plaintiffs/appellants have shown sufficiently that the decisions challenged are outside the discretionary function exception, as the exception has recently been clarified in *Berkovitz*.

B. Since there is a Possible Set of Facts that will Support Petitioners' Claims, the Ruling Below is in Error

In affirming the dismissal at the pleading stage of Petitioners' complaint, the court of appeals failed to follow this Court's established standard for dismissals under Rule 12. This test was set out in seminal form in *Conley v. Gibson*, 355 U.S. 41 (1957):

> [I]n appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Id., 355 U.S. at 45-46.

The only question on a motion to dismiss, therefore, is whether in the light most favorable to plaintiff, and with every doubt resolved in his behalf, the complaint states a valid claim for relief. *Jenkins v. McKeithen*, 395 U.S. 411 (1969). It goes without saying that courts of appeals uniformly have hewn to this standard. *E.g., Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101 (7th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985); *Battlefield Builders, Inc. v. Swango*, 743 F.2d 1060 (4th Cir. 1984); *Loge v. United States*, 662 F.2d 1268 (8th Cir. 1981) *cert. denied*, 456 U.S. 944 (1982).

In this case, the court of appeals acknowledged that two passages of testimony from public hearings showed that scientific factors guided the decisions Petitioners challenged as negligent. *Wells, supra*, 851 F.2d at 1477-78 n.5. The court concluded, however, that this testimony should be read in a context different from that advanced by Petitioners, and therefore that Petitioners had erroneously attributed any significance to the testimony. The Court also noted other hearings testimony tending to show that economic, social and political factors weighed in the challenged decisions. *Id.* at 1477.

It should be self-evident that by conducting this analysis; the court of appeals fatally violated the *Conley* and *Jenkins* standard. A court cannot choose what context in which to evaluate evidence; it must view that evidence *in the light most favorable to the plaintiff*. Moreover, a court cannot decide whether one piece of evidence is more important than another piece, or more fully disposes of an issue. If plaintiff presents some evidence to suggest a possible set of facts, consistent with his complaint and actionable, then dismissal is improper.

In this case, the court below acknowledgedly did not view Petitioner' evidence in the light most favorable to them, and explicitly decided that the Government's evidence on the factors underlying Dr. Hernandez's decision was somehow more valid than Petitioners' evidence. It should not be necessary to point out that this is not the court's function; there was a clash in the evidence, and under Petitioners' evidence their claims were cognizable. Dismissal was therefore incorrect.

WHEREFORE, PREMISES CONSIDERED, Petitioners pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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- AND -

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APPENDIX

United States Court of Appeals

—FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 10, 1987 Decided July 19, 1988

No. 87-5124

ELLA MAE WELLS, et al., APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 85-03333)

Charles S. Siegel for appellants.

Gregory C. Sisk, Attorney, Department of Justice, with whom *Richard K. Willard*, Assistant Attorney General, *Joseph E. diGenova*, United States Attorney and *Robert S. Greenspan*, Attorney, Department of Justice, were on the brief for appellee.

Before: ROBINSON and EDWARDS, *Circuit Judges*, and MACKINNON, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* MACKINNON.

MACKINNON, *Senior Circuit Judge*: Plaintiffs, 189 families composed of 571 persons who reside in the Dallas, Texas area, seek compensation for personal injuries and property damage which they and their minor children claim to have suffered due to alleged negligent acts and omissions of the Environmental Protection Agency ("EPA"). Plaintiffs claim that the EPA negligently regulated and communicated knowledge of public health risks and lead pollution dangers in plaintiffs' neighborhoods.[1] The district court granted the government's motion to dismiss, citing two exceptions to the Federal Tort Claims Act (the "Act"), 28 U.S.C. §§ 1346(b), 2671-2680, 2680(a) and 2680(h). *Wells v. United States of America*, 655 F. Supp. 715 (D.D.C. 1987). We affirm the district court's decision on the basis of the exception in the Act for discretionary functions and duties. 28 U.S.C. § 2680(a).

I. FACTUAL BACKGROUND

Plaintiffs allege that for many years the EPA has continuously and gratuitously monitored and evaluated lead pollution levels in their neighborhoods that surround three lead smelters, RSR Corporation, Dixie Metals Corporation and N.L. Industries. One of the housing projects in which plaintiffs live, is "directly downwind from the largest lead recycling plant in the world." Brief for Appellants at 3. Plaintiffs contend that "[r]esultant brain damage and developmental impairments [from lead

---

[1] The government contends that 95 of the 571 claims are barred under § 2675(a) of the Federal Tort Claims Act because the claimants did not file the required administrative claims with the EPA. Brief for Appellee at 6 n.5. 28 U.S.C. §§ 1346(b), 2671-2680, 2675(a). The district court did not address this issue. *Wells*, 665 F. Supp. at 717 n.2. We also find it unnecessary to reach this issue.

pollution] have produced lifelong debilitating effects . . ." *id.* at 4, and that the EPA negligently violated an alleged legal duty to inform them of the risks and to adequately and timely remedy the hazards or to so require.

Plaintiffs also claim that the EPA affirmatively misled them as to the full extent of the lead pollution problem in that after the regional study was completed, Washington EPA headquarters deleted information from a press statement to mislead the public as to the extent of the lead contamination; that the EPA deleted all information indicating that elevated lead levels had been found in children's blood and in the soil around day care centers and school playgrounds; and that Dr. Norman Dyer, Chief of the EPA Pesticides and Toxics Branch, was discouraged from keeping any notes of his work on the regional lead study.

The district court found plaintiffs' claims barred by the misrepresentation exception of the Act which provides:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> . . . (h) Any claim arising out of . . . misrepresentation, deceit . . .

28 U.S.C. § 2680(h). *Wells*, 655 F.Supp. at 724. We need not determine the applicability of this misrepresentation exception, or whether the issue is preserved on appeal, because we find that the discretionary function exception applies and the government is immune from suit. Also, because of the application of the discretionary function exception, we need not determine whether the government would be liable as a private person under the good samaritan doctrine of Texas' tort law.

Finally, plaintiffs cursorily assert that the EPA violated the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, by failing to "require the submission by Texas of a 'lead implementation plan' for the Dallas area." Brief for Appellants at 7. Although plaintiffs do refer to the

Clean Air Act claim in two sentences of their brief, *id.*, they make no factual or legal arguments in support thereof. Therefore we cannot address the issue.

Plaintiffs' claims primarily concentrate on the allegedly negligent decision of Dr. John Hernandez, the EPA Deputy Administrator for the area, to conduct further study while refusing to take immediate remedial action or to accept an offer of one of the lead companies to clean up the area. After an EPA regional office conducted a study of lead in soil samples and school children's blood, RSR Corporation made a written offer to EPA to replace soil having lead concentrations of over 1000 parts per million. Dr. Hernandez decided, however, that further study was necessary in order to determine whether the 1000 parts per million standard was an appropriate lead testing level for soil and did not accept the company's offer to clean up the area. In making the decision to further study the problem, he was motivated by his conclusion that if he accepted the company's offer he would implicitly be establishing a precedent that might be too stringent to be applied generally, even though there was evidence that some hazards existed at that level. Dr. Hernandez decided that eighteen months of additional blood testing should be conducted. *Wells*, 655 F. Supp. at 718. RSR Corporation subsequently voluntarily cleaned up the area.

II. Analysis

A. *Applicable Standard*

The district court granted the government's motion to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(1), 12(b)(6). In order to survive a motion to dismiss, "the complaint must set forth sufficient information to suggest that there exists *some* recognized legal theory upon which relief can be granted." *Gregg v. Barrett*, 771 F.2d 539, 547 (D.C.

Cir. 1985), quoting *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1081 (D.C. Cir. 1984). Plaintiffs emphasize that they need only "adduce a set of facts" supporting their legal claims in order to survive a motion to dismiss. Brief for Appellants at 1. *See also id.* at 14; Reply Brief for Appellants at 13-15, 18-19. Assuming all factual allegations are true, a court must dismiss a complaint if the plaintiff fails to establish a right to relief based on the facts alleged in the complaint. *Gregg*, 771 F.2d at 547.

B. *The Private Liability Requirement of the Tort Claims Act*

At the outset the government relies upon the private liability requirement that derives from section 1346(b) of Title 28. This provides that federal courts have jurisdiction over actions involving claims against the United States for

> the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b). The Tort Claims Act further provides that the government shall be liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674.

We reject the government's argument that, as a threshold matter, the Act does not apply when the government is engaged in a "core governmental function." Brief for Appellee at 23. Very few decisions even mention the Act's private liability requirement and we have found no decisions that rely solely on such requirement or any "core governmental function" doctrine in holding the government immune from suit. *See United States v. Muniz*, 374 U.S. 150, 153 (1962) ("Whether a claim could be

made out would depend upon whether a private individual under like circumstances would be liable under state law . . ."); *Rayonier, Inc. v. United States*, 352 U.S. 315, 319 (1956) ("the test . . . is whether a private person would be responsible for similar negligence under the laws of the State where the acts occurred."); *Arvanis v. Noslo Engineering Consultants, Inc.*, 739 F.2d 1287, 1292 (7th Cir. 1984) ("In the absence of any persuasive analogy with private conduct, we conclude that appellants cannot maintain a Tort Claims action against the United States."); *Gelley v. Astra Pharmaceutical Products, Inc.*, 466 F.Supp. 182, 185 (D.Minn. 1979) ("Regulatory activity engaged in by FDA personnel simply has no counterpart in private activity and thus cannot give rise to liability . . ."), *aff'd*, 610 F.2d 558, 563 (8th Cir. 1979). Most cases simply quote the private liability requirement of section 1346(b) and then proceed to rely upon the Act's discretionary function exception. *See, e.g., United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808. The Supreme Court recently rejected the government's core governmental function argument in *Berkovitz v. United States*, —— U.S. —— (1988). Justice Marshall, writing for a unanimous Court, commented that the government's core governmental function argument "appears to replicate precisely the position expressly rejected" in *Indian Towing Co. v. United States*, 350 U.S. 61, 64-65 (1955), and *Rayonier, Inc. v. United States*, 352 U.S. 315, 318-19 (1957). *Berkovitz*, No. 87-498, slip op. at 7 n.5 (June 13, 1988). Furthermore, as set forth in the margin, courts have imposed liability on the United States in many situations in which the government was engaged in activities that have no analogy in the private sector.[2]

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[2] This court has "imposed liability upon the United States for its performance of activities that are not usually performed by private persons." Canadian Transport Co. v. United States, 663 F.2d 1081, 1090 (D.C. Cir. 1980). In *Canadian Transport*, we held the government subject to suit

The district court concluded that the private liability requirement "merely establishes the foundation for" and is "largely congruent with" the discretionary function exception to the Act, and therefore the court did not consider the private liability requirement separately. 665 F. Supp. at 719. The government argues that the private liability requirement is both "a logical prerequisite" to a consideration of the Act's exceptions and "an independent basis upon which to affirm the district court's dismissal in this case." Brief for Appellee at 15 n.9. However, there are very few decisions that even discuss the private liability requirement, *see supra* note 2, and we have found

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in a case in which the Coast Guard refused to permit a Polish vessel to enter a United States port with naval installations on grounds of national security. Six years later in Red Lake Band of Chippewa Indians v. United States, 800 F.2d 1187 (D.C. Cir. 1986), this court held that the government was not protected from certain claims in a case in which an Indian tribe sought compensation for property damage allegedly due to the negligence of an FBI agent in ordering law enforcement personnel to withdraw from a hostage situation on an Indian reservation. *See also* Black v. Sheraton Corp. of America, 564 F.2d 531 (D.C. Cir. 1977) (former lobbyist's action seeking compensation for injuries allegedly sustained due to concededly illegal eavesdropping by FBI is not barred under the Federal Tort Claims Act). In Indian Towing Co. v. United States, 350 U.S. 61 (1955), the Supreme Court held the government liable under the Act in a suit for damages allegedly caused by the Coast Guard's negligent operation of a light house. The Court rejected the government's contention that the Act "must be read as excluding liability in the performance of activities which private persons do not perform. . ." *Indian Towing*, 350 U.S. at 64, and concluded that "we would be attributing bizarre motives to Congress were we to hold that it was predicating liability on such a completely fortuitous circumstance—the presence or absence of identical private activity." *Id.* at 67. Furthermore, contrary to the government's assertion, Brief for Appellee at 22-24, courts have not examined whether the activity that caused the harm was the direct responsibility of the government, or was merely subject to the government's regulation. *See infra* note 3.

none that rely solely on it to hold the government immune from suit. Therefore, we reject the government's reliance on the private liability requirement. Instead we rely solely upon the discretionary function or duty exception, *infra*.

C. *The Tort Claims Act and the Discretionary Function Exception*

1. *The Purpose of the Discretionary Function Exception*

The Federal Tort Claims Act, 28 U.S.C., Chapter 171, §§ 2674-2680 provides:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . [but the] provisions of this chapter and section 1346(b) [the jurisdictional statute] . . . shall not apply to—
>
> > Any claim . . . based upon the exercise or performance or the failure to exercise or perform a *discretionary function or duty* on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. §§ 2674, 2680(a) (emphasis added). The effect of this provision of the Act is to waive the government's sovereign immunity for certain kinds of tort liability, but then create an exception to this waiver by excluding the government from any liability where the claim is based upon "the exercise or performance or the failure to exercise or perform a discretionary function or duty . . ." *Id.*

In the leading case interpreting this provision of the Act, the Supreme Court explained: "[I]t was not contemplated that the Government should be subject to liability arising from acts of a governmental nature or function . . . . Uppermost in the collective mind of Con-

gress [in waiving immunity] were the ordinary common-law torts. Of these, the example which is reiterated in the course of the repeated proposals for submitting the United States to tort liability is 'negligence in the operation of vehicles.'" *Dalehite v. United States*, 346 U.S. 15, 28 (1952), quoting numerous references in legislative history. *Dalehite* involved large damage claims against the United States arising out of a disastrous explosion of a ship carrying ammonium nitrate fertilizer, that had been produced and distributed under the direction of the United States. The Court concluded that the action was barred by § 2680(a), *supra*, because the allegedly negligent act involved governmental discretion "to act according to one's judgment of the best course" to follow with respect to the program generally and the handling of its product. *Dalehite*, 346 U.S. at 34. The Court commented that

> the "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion.

346 U.S. at 35-36. *Dalehite* also incorporated an extract from the House Report on the bill which stated:

> [The exemption was] also designed to preclude application of the bill [Act] to a claim against a regulatory agency . . . based upon an alleged abuse of discretionary authority by an officer or employee, whether or not negligence is alleged to have been involved.

346 U.S. at 29, n.21.

More recently the Supreme Court in *United States v. S.A. Empresa de Vicao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984), pointed to the intent of Congress in enacting the statute and its legislative his-

tory. *Varig Airlines* involved tort actions by an airline and victims of an airplane accident who alleged that the Federal Aviation Administration ("FAA") was negligent in certifying the airline because its trash receptacles did not satisfy safety regulations. The *Varig Airlines* Court unanimously held that the FAA's certification process was immune under the discretionary function or duty exception, concluding that "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." *Id.* at 813. With respect to congressional intent the Court stated that the exception "plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals," *id.* at 813-14,[3] and concluded that Congress' emphasis on protecting regulatory activities suggests an underlying basis for the exception, i.e.: "Congress wished to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in *social, economic*, and *political policy* through the medium of an action in tort." *Id.* at 814 (emphasis added). The Supreme Court in *Berkovitz* also reaffirmed its interpretation that Congress' purpose in enacting the exception was

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[3] The government relies partially on this language from *Varig Airlines* in arguing that the "discretionary function exception presumptively applies to the Government when acting in its capacity as a regulator of individual conduct." Brief for Appellees at 31. Courts have unanimously rejected this position. *See, e.g.* Collins v. United States, 783 F.2d 1225, 1229 (5th Cir. 1986) ("We reject the government's argument that *Varig* exempts the United States from liability whenever challenged conduct is regulatory in nature. Neither the language nor the structure of the decision in *Varig* supports such a view."). Berkovitz v. United States, —— U.S. —— (1988), further noted that "[i]n restating and clarifying the scope of the discretionary function exception, we intend to specifically reject the Government's argument . . . that the exception precludes liability for any and all acts arising out of the regulatory programs of fedreal agencies." *Berkovitz*, No. 87-498, slip op. at 6 (June 13, 1988).

"to prevent '[j]udicial intervention in . . . the political, social, and economic judgments' of governmental—including regulatory—agencies." *Berkovitz v. United States*, —— U.S. —— (1988), No. 87-498, slip op. at 7 (June 13, 1988), quoting *Varig Airlines*, 467 U.S. 814.

Other subsequent decisions have echoed *Varig Airlines'* concern about judicial second guessing of agency decision making. In *Cisco v. United States*, 768 F.2d 788, 789 (7th Cir. 1985), the Seventh Circuit ruled that "Congress has left to the EPA to decide the manner in which, and the extent to which, it will protect individuals and their property from exposure to hazardous wastes." The facts in *Cisco* are almost parallel to those here. Members of several households in *Cisco* sued the EPA claiming that it "was negligent in failing to warn [them] . . . that dirt contaminated by [hazardous dioxin] . . . had been used as residential landfill, negligent in failing to require that the contaminated dirt be removed, and negligent in failing to protect the households from exposure to the toxin." *Id.* The court relying primarily upon *Varig Airlines*, dismissed the action on the ground that the discretionary exception of the statute applied, and held:

> When an agency makes decisions regarding the supervision of private individuals,
>
> > it is exercising discretionary regulatory authority of the most basic kind. Decisions as to the manner of enforcing regulations directly affect the feasibility and practicality of the Government's regulatory program; such decisions require the agency to establish priorities for the accomplishment of its policy objectives by balancing the objectives sought to be obtained against such practical considerations as staffing and funding . . . . Judicial intervention in such decisionmaking through private tort suits would require the courts to "second-guess" the *political, social, and economic* judgments of an agency exercising its regulatory function. It was pre-

> cisely this sort of judicial intervention in policy-making that the discretionary function exception was designed to prevent.

Cisco, 768 F.2d at 789, quoting *Varig Airlines*, 467 U.S. at 820 (emphasis added).

In *Gray v. Bell*, 712 F.2d 490 (D.C. Cir. 1983), former FBI Acting Director Gray sued the United States claiming that the Justice Department's investigations of him were negligent. This court held that the United States was immune from suit under the discretionary function exception. We noted that the most important modern policy basis for sovereign immunity is that under "principles of separation of powers, courts should refrain from reviewing or judging the propriety of the policymaking acts of coordinate branches." *Gray*, 712 F.2d at 511. *See also Sami v. United States*, 617 F.2d 755, 766-67 (D.C. Cir. 1979) ("[T]he policy of the [discretionary] exception was to 'prevent[] tort actions from becoming a vehicle for judicial interference with decisionmaking that is properly exercised by other branches of the government' . . ." quoting *Blessing v. United States*, 447 F. Supp. 1160, 1170 (E.D. Pa. 1978)).

2. *Application of the Discretionary Function Exception to This Case*

Plaintiffs argue that Dr. Hernandez's decision was based only upon scientific considerations, and therefore that it does not fall within the discretionary function exception. Brief for Appellants at 14-20; Reply Brief at 13-19. Both sides point to congressional hearings ("Hearings") transcripts to support their arguments.[4] On this issue we find that Dr. Hernandez's decision to

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[4] *Hazardous Waste Contamination of Water Resources (EPA Implementation of the Superfund Program and Lead Pollution Problems in Dallas, TX): Hearings Before the House Subcommittee on Investigations and Oversight of the House Committee on Public Works and Transportation*, 98th Cong., 1st Sess. (1983).

order further study was based on economic, social and political policy considerations, and not solely on scientific considerations as plaintiffs claim. The discretionary function exception precludes liability in this case because Dr. Hernandez was exercising permissible discretion based on policy considerations in deciding to order further study. In *Berkovitz v. United States*, *supra*, it was held that the government was not insulated from suit by the discretionary function exception. The Court explained that since plaintiff's claim alleged that the government violated mandatory directives, the government had no discretion, and therefore the discretionary exception could not apply. The unanimous opinion emphasized that the exception "protects only governmental actions and decisions based on considerations of public policy." *Berkovitz*, No. 87-498, slip op. at 5 (June 13, 1988). *Berkovitz* distinguished cases, such as the present one, in which "the policies and programs formulated by the [government] allow room for implementing officials to make independent policy judgments. . . ." *Id.* at 14-15. In cases which involve policy judgment and discretion, such as this one, "the discretionary function exception protects the acts taken by those officials in the exercise of this discretion." *Id.* at 15.

In the agency Hearings here there are two examples of economic considerations that Dr. Hernandez took into account in making his decision. *See* Hearings at 62 (J.A. 105) (Dr. Hernandez quoted as saying that EPA was proposing approaches to the lead contamination issue "that will be within the context of practicality of our budgetary restraints."); Hearings at 320 (J.A. 132) (Frances Phillips, EPA Deputy Regional Administrator, states that Dr. Hernandez told her "that he did not think we should spend any money to remove dirt or have any bulldozers start up until we could identify a specific health problem relative to this case.").

The following statements in the Hearings support the conclusion that Dr. Hernandez also took social and political factors into account in reaching his decision. *See* Hearings at 66 (J.A. at 109) (Dr. Hernandez explains: "Supposing that we had, the first day that report turned up, said 'Let's go and take that playground and clean that place up, and they do this, and say "Done" and get a settlement out of it,' and then we would have been charged with a 'sweetheart' deal with somebody, done in the dark of night, before we had done any kind of further study, when in fact, we found that this study showed problems further out."); Hearings at 67 (J.A. 110) (Dr. Hernandez states that "moving ahead without some kind of information as to the nature of the source, the mode of travel, the kinds of control techniques that might otherwise be used, would leave us open to the same kinds of criticisms, 'Why did you do that?' "); Hearings at 317 (J.A. 129) (Mrs. Phillips states that "Dr. Hernandez was concerned about the precedent that cleaning up at an action level of over a 1,000 parts per million would set, not only in the Dallas area, but relative to all the urban areas and lead smelter areas across the country."); Hearings at 335 (J.A. 147) (Mrs. Phillips and Dr. Hernandez discussed, among other factors, "a primary concern for the children" and "the effect this had on other Federal court cases in the region . . . and how this could affect our negotiations.").[6]

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[6] Plaintiffs primarily rely on two exchanges that took place at the Hearings to support their view that Dr. Hernandez relied only upon medical factors. The first of such exchanges is Dr. Hernandez's statement: "You know, if you said, 'I want to change your mind about using good information, about collecting the best information, about looking at exposures,' you know, risks to human health are based on two things—one, the presence of a toxic material whose risk we analyze; and the second one is the exposure and the exposure route that you have. And it is through those two processes, neither one independent of the other, that we make our decisions." Hearings at 67 (J.A. 110). This quote cannot be

II. CONCLUSION

Even though plaintiffs need only "adduce a set of facts," Brief for Appellants at 1, supporting their legal claims in order to survive a motion to dismiss, *Gregg v. Barrett*, 771 F.2d 539, 547 (D.C. Cir. 1985), the government must prevail in this case. Since Dr. Hernandez's decision ordering further study involved "social, economic and political policy" considerations, *Berkovitz*, 56 U.S.L.W. 4549, 4550, quoting *Varig Airlines*, 467 U.S. at 814, it is protected by the discretionary function exception. Therefore the government is immune from suit.[6]

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taken out of context. In context it does not support plaintiffs' argument because Dr. Hernandez's further comments show that he considered many nonscientific factors. Furthermore, the quote does not state that he did not consider other factors besides the two he mentioned.

The second exchange plaintiffs rely on derives from testimony of four of Dr. Hernandez's subordinates. Congressman Snyder inquired of them whether they had "any reason to believe that any actions on his (Dr. Hernandez) part were based upon anything other than his scientific judgment." Hearings at 339 (J.A. 151). They each replied that they did not. *Id.* Plaintiffs also take these statements out of context. Congressman Snyder was actually questioning the four subordinates to determine whether they knew of any "unholy alliance between Dr. Hernandez and any of the three companies" that could have influenced his decision. *Id.* They did not.

[6] The plaintiffs and the government disagree on which aspect of the EPA's actions this court should examine to determine whether the discretionary function exception applies. Plaintiffs want the court to focus on Dr. Hernandez's decision to conduct further study of lead pollution levels. Reply Brief for Appellants at 11. The government contends that the court should instead concentrate its analysis on "the overall discretionary activity at issue, the formulation of policy standards for dealing with a particular environmental problem." Brief for Appellees at 32.

The government cites two cases to support its view that it is improper for a court to "compartmentalize one aspect of

We affirm the dismissal of the complaint because even assuming that all of its factual allegations are true, plaintiffs have failed to establish a right to relief. We are therefore without jurisdiction.

Judgment accordingly.

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a discretionary regulatory program and determine its policy implications in isolation." Brief for Appellants at 32-33. Neither case supports the government's argument. In Smith v. Johns-Manville Corp., 795 F.2d 301 (3d Cir. 1986), asbestos suppliers sued the United States for indemnity and contribution for employees' injuries. The court held that the General Services Administration's decision to sell asbestos "as is" fell within the exception. The court disagreed with the defendants' view that the court should isolate the agency's decision not to use warning labels from the rest of the program. *Smith*, 795 F.2d at 308. The basis for the decision in *Smith* is distinguishable from the basis that is applicable here. *Smith* emphasized that *Dalehite* bars suits when administrators act in conformance with official directions. *Id.* In this case, Dr. Hernandez, as EPA Deputy Administrator, was formulating policy, not following official directions.

The government also cites *Gray v. Bell, supra*, to support its position. The court found the government immune under the exception, holding that the "tortious actions allegedly undertaken by the defendants are too intertwined with purely discretionary decisions. . . ." *Gray*, 712 F.2d at 515-16. *Gray* limited its holding to the facts presented. *Id.* at 516. The government argues that, as in *Gray*, it is impossible to consider "an isolated decision to conduct further study of a pollution hazard . . . apart from the broad regulatory process of developing a standard to apply." Brief for Appellants at 34. Dr. Hernandez's decision is not too "intertwined" with the overall regulatory process for this court to examine it. Dr. Hernandez was in charge of formulating policies to deal with the lead problem in Dallas. His decision to order further study of the lead situation is a distinct aspect of the overall policy formulation not to participate in a private cleanup that could implicitly sanction an unproven standard and arguably establish a controlling precedent as to a level of pollution requiring government action.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5124 September Term, 1987

D.C. Civil No. 85-0333

United States Court of Appeals
For the District of Columbia Circuit
FILED JUL 19 1988
CONSTANCE L. DUPRE'
CLERK
(stamp)

Ella Mae Wells, et al.,

Appellants

v.

United States of America,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before: ROBINSON and EDWARDS, Circuit Judges, and MacKINNON, Senior Circuit Judge

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the Court, that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT:

s/s Constance L. Dupre
CONSTANCE L. DUPRE, CLERK

Date: July 19, 1988
Opinion for the Court filed by Senior Circuit Judge MacKinnon

Ella Mae WELLS, et al.,

Plaintiffs,

v.

UNITED STATES of America,

Defendant.

Civ. A. No. 85-3333.

United States District Court,
District of Columbia.

Feb. 2, 1987.

The United States moved to dismiss complaint brought by area residents against Environmental Protection Agency with respect to monitoring of lead pollution hazards. The District Court, Parker, Senior District Judge, held that alleged acts and omissions on part of Environmental Protection Agency when, with knowledge that toxic lead pollution existed and that a public health risk to residents of area was posed, it failed to correct or require those responsible for contamination to correct the problem fell within discretionary function exception of Federal Tort Claims Act and precluded recovery for physical and psychological harms and property damage which residents and their minor children allegedly suffered as a direct and proximate result thereof.

Motion granted.

1. **United States KEY78(3)**

Liability may be assessed against United States under the Federal Tort Claims Act only if a private person would be liable under comparable circumstances. 28 U.S.C.A. § 1346(b).

2. **United States KEY78(5)**

A violation of a duty imposed by federal statute, without more, does not give rise to cause of action under the Federal Tort Claims Act. 28 U.S.C.A. § 1346(b).

3. **United States KEY78(12)**

Provisions of the Federal Tort Claims Act are not intended to test the validity of or provide a remedy on account of discretionary acts even though negligently performed and involving an abuse of discretion, but are intended to provide a remedy for individuals harmed through the commission by government employees, acting within the scope of their employment, of acts characterized as common-law torts. 28 U.S.C.A. § 1346(b).

4. **United States KEY78(5)**

Whether the United States could otherwise be held liable under the "Good Samaritan" doctrine set forth in the Restatement (Second) of Torts is not controlling in the face of specific exemptions from liability under the Federal Tort Claims Act. 28 U.S.C.A. § 2680(a, h).

5. **United States KEY78(12)**

Discretionary function exception was meant to exempt from the Federal Tort Claims Act claims arising from the regulatory activities of federal agencies. 28 U.S.C.A. § 2680(a).

6. **United States KEY78(12)**

Applicability of the discretionary function exception to the Federal Tort Claims Act depends, not upon the rank of

the government actor reaponsible for the alleged misfeasance, but upon the nature of the conduct in question. 28 U.S.C.A. § 2680(a).

7. United States KEY78(12)

Discretionary acts of the government acting in its role as a regulator of the conduct of private individuals are presumptively exempt from liability under the Federal Tort Claims Act as a means of preventing judicial second guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. 28 U.S.C.A. § 2680(a).

8. United States KEY78(12)

Conduct implicating enforcement of safety or health regulations is exempt from liability under discretionary function exception of Federal Tort Claims Act to extent that government actors are in any way engaged in making policy decisions; calling into doubt *Griffin v. United States*, 500 F.2d 1059 (3d Cir.). 28 U.S.C.A. § 2680(a).

9. United States KEY78(12)

Alleged acts and omissions of Environmental Protection Agency when, with knowledge that toxic lead pollution existed and that public health risk was posed, it failed to correct or require those responsible for contamination to correct the problem fell within discretionary function exception of Federal Tort Claims Act and precluded recovery for physical and psychological harms and property damage which residents and their minor children allegedly suffered as a direct and proximate result thereof. 28 U.S.C.A. §§ 1346(b), 2680(a).

10. Health and Environment KEY25.5(5.5)

Authority of Environmental Protection Agency to enforce environmental standards generally, or to respond to a particular environmental problem as it arises, does not require EPA to warn area residents of local toxic pollution or to have those wastes removed. 28 U.S.C.A. § 2680(h); Clean Air Act, § 110(a)(1, 2), 42 U.S.C.A. § 7410(a)(1, 2).

11. Health and Environment KEY 25.5(5.5)

Discretion is vested in Environmental Protection Agency to decide manner and extent to which it will protect individuals from exposure to hazardous wastes. 28 U.S.C.A. § 2680(h); Clean Air Act, § 110(a)(1, 2), 42 U.S.C.A. § 7410(a)(1, 2).

12. United States KEY78(9, 10)

"Misrepresentation" exception in Federal Tort Claims Act, though applied more often to claims arising in a commercial context, may be applied to a claim for personal injuries or property damage. 28 U.S.C.A. § 2680(h).

13. United States KEY78(9)

Claim, as to alleged acts and omissions on part of Environmental Protection Agency in monitoring, evaluating, regulating and communicating knowledge of public health risks and lead pollution hazards in area relied heavily upon an express charge of willful disinformation and, to that extent, was clearly excluded by "misrepresentation" exception to Federal Tort Claims Act. 28 U.S.C.A. § 2680(h).

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MEMORANDUM OPINION

BARRINGTON D. PARKER, Senior District Judge:

This civil proceeding is brought against the United States under the Federal Tort Claims Act ("FTCA" or "Act"), 28 U.S.C. §§ 1346(b), 2671-2680 (1982), by 571 persons residing in the Dallas, Texas area. Plaintiffs seek monetary recovery for physical and psychological harms and property damage which they and their minor children allegedly suffered as a direct and proximate result of the negligent acts and omissions of the Environmental Protection Agency ("EPA")[1] in monitoring, evaluating, regulating and communicating knowledge of public health risks and lead pollution hazards in their neighborhoods.

In Count I, plaintiffs alleged that, at all relevant times, EPA knew that toxic lead pollution existed and that the residents of the Dallas area were exposed to lead pollution risks, yet the government negligently failed to correct or require those responsible for the contamination to correct the problem. Complaint ¶ 9(d). Plaintiffs further contend that EPA was negligent in failing to adequately warn of the pollution hazards. Complaint ¶¶ 9(a), (d), (e). Count II charges EPA with having violated its statutory mandate as embodied in the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*

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1. **For ease of reference, defendant United States and the EPA will be referred to collectively as the "government."**

("CAA"). Complaint ¶ 10. Specifically, plaintiffs allege that EPA failed to order the State of Texas to submit a plan for the "implementation, maintenance, and enforcement" in the Dallas area of primary and secondary air quality standards as required by section 110 of the CAA, 42 U.S.C. § 7410.

The government has moved to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(1) (lack of subject matter jurisdiction) and Rule 12(b)(6) (failure to state a claim upon which relief can be granted), relying upon two primary exceptions to the FTCA. First, the government argues that no claim may be asserted for what it maintains was no more than a "failure to perform a discretionary function or duty . . .," citing 28 U.S.C. § 2680(a). Second, the government contends that it is immunized against liability for either intentional or negligent misrepresentation under 28 U.S.C. § 2680(h). In addition, the government points out that it is subject to liability only in the same manner and to the same extent as a private person, citing 28 U.S.C. § § 1346(b) and 2674, and that because it was engaging in a uniquely governmental function with regard to the occurrences in question, it is effectively immune from liability under the Act.

Finally, the government asserts that since all the plaintiffs reside in the State of Texas and because the acts or omissions complained of relative to the pollution problem all occurred there, the complaint should be dismissed for improper venue under Fed.R.Civ.P. 12(b)(3). It thus argues that venue would be proper only the Northern District of Texas, under 28 U.S.C. § 1402(b).

For the reasons set forth below, the Court determines that the discretionary function and misrepresentation exemptions of the FTCA, or alternatively, that under 28

U.S.C. § 2674, liability does not lie against the United States because a private person would not be so liable under similar circumstances. Accordingly, the Court does not reach the question of whether venue is proper in this district.[2]

BACKGROUND

In support of their complaint, plaintiffs allege the following facts, which, for purposes of resolving the motion, will be accepted as true. *See Papasan v. Allain*, _____ U.S. _____ , 106 S.Ct. 2932, 2943, 92 L.Ed.2d 209 (1986); *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957); *Gregg v. Barrett*, 771 F.2d 539, 547 (D.C.Cir.1985). For some time EPA has monitored and evaluated the levels of lead pollution in areas surrounding the business operations of three lead manufacturing companies,[3] located near plaintiffs' neighborhoods.

Plaintiffs charge that while the EPA knew of high levels of lead pollution in their neighborhoods for many years, it nonetheless failed to remedy the situation. The charges are based in large part on oversight hearings conducted in 1983 by a subcommittee of the House Committee on Public Works and Transportation. Specifically, an EPA regional office conducted a study in the Dallas area, analyzing the levels of lead in soil samples and in the blood of school children. That study found that blood lead levels were elevated and determined, according to a proposed testing

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2. Because of this determination, the Court need not reach the government's contention that certain of the 571 claims are barred under § 2675(a) of the FTCA because the claimants did not file the required administrative claims before filing this suit.

3. The three manufacturers named in the complaint are the RSR Corporation, Dixie Metals Corporation and N.L. Industries.

standard of 1000 parts per million, that soil samples also contained elevated concentrations of lead.

Following the conclusion of this study, the RSR Corporation, one of the three lead manufacturers in the area, made a written commitment to EPA to clear up the pollution problem by replacing soil found to have concentrations of lead over 1000 parts per million. Instead of accepting this offer, Dr. John Hernandez, the Deputy EPA Administrator stationed in Washington, D.C., decided that further study was needed to determine whether the 1000 parts per million standard used in the regional study was an appropriate testing level for lead. Dr. Hernandez felt that this level might be too stringent a standard on which to base a clean up program; however, there existed at the time evidence that the standard of 1000 parts per million was in fact quite lax. He also decided that 18 months of additional blood testing should be conducted.

Plaintiffs further charge that, following completion of the regional study, Washington EPA headquarters deleted information from a prepared official press statement in order to mislead the public as to the extent of the lead contamination. Specifically, EPA headquarters is alleged to have deleted all information indicating that elevated levels of lead had been found in the blood of children and in the soil around school playgrounds and day care centers. Plaintiffs also claim that Dr. Norman Dyer, Chief of the EPA Pesticides and Toxics Branch, was discouraged from keeping any notes or memoranda of his work conducted as part of the regional study. Dr. Dyer's superiors at EPA allegedly wished to conceal the extent of the danger from the public, especially that faced by the neighborhood children.

Plaintiffs also assert that EPA acted in violation of its statutory directive as embodied in the CAA, 42 U.S.C.

§§ 7401 *et seq.*, and in so doing directly and proximately caused their injuries. Specifically, they charge that EPA failed to carry out its duty to timely and properly approve or disapprove a state implementation plan for lead clean-up in the Dallas area, as required by 42 U.S.C. § 7410.

ANALYSIS

A. Liability Under the FTCA

[1-3] In a tort claim brought against the United States, damages may be obtained

> for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b). That section makes it quite clear that liability may be assessed against the United States only if a private person would be liable under comparable circumstances. Similarly, section 2674 provides that the United States shall be liable "in the same manner and to the same extent as a private individual under like circumstances. . . ." Therefore, the relevant question becomes whether the United States breached duties owed plaintiffs analogous to duties prescribed by *local* law for private actors. *Art Metal–U.S.A., Inc. v. United States*, 753 F.2d 1151, 1157-59 (D.C.Cir. 1985). A violation of a duty imposed by federal statute, without more, does not give rise to a cause of action under the FTCA, *id.* at 1157, nor was it Congress' intention that

the FTCA be used to "test the validity of or provide a remedy on account of . . . discretionary acts even though negligently performed and involving an abuse of discretion." H.R.Rep. No 2245, 77th Cong., 2d Sess. 10; S.Rep. No. 1196, 77th Cong., 2d Sess. 7; H.R.Rep. No. 1287, 79th Cong., 1st Sess. 5-6; Hearings before House Com. on Judiciary on H.R. 5373 and H.R. 6463, 77th Cong., 2d Sess. 33, *quoted in Dalehite v. United States*, 346 U.S. 15, 29 n. 21, 30, 73 S.Ct. 956, 964 n. 21, 965, 97 L.Ed. 1427 (1953). Rather, it was Congress' purpose to provide a remedy for individuals harmed through the commission by government employees, acting within the scope of their employment, of acts most easily characterized as common-law torts.[4] 346 U.S. at 27-28, 73 S.Ct. at 963-64.

[4] To a great extent, the requirement that liability would have to lie against a private person under like circumstances before it may lie against the United States merely establishes the foundation for the "discretionary function" exception codified at 28 U.S.C. § 2680(a). In other words, because only governmental entities engage in the kinds of regulatory activities that fall within the discretionary function exception, there could be no rule of private liability analogous to which a governmental actor could be sued. Similarly, because the discretionary function and the "misrepresentation" exceptions of section 2680(h) are rooted in common ground,[5] the "private liability" requirement may

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4. It is interesting to note that, under the FTCA, liability does not lie against the United States for a host of otherwise actionable common-law torts. *See* 28 U.S.C. § 2680(h) (no claim for assault, battery, false imprisonment, false arrest, malicious prosecution, or abuse of process—unless committed by investigative or law enforcement officers—or for libel, slander, misrepresentation, deceit, or interference with contract rights).

5. *See infra* 724.

be seen as the predicate for exempting government misrepresentations from tort liability under the FTCA. Since the "private liability" requirement is, for purposes of analyzing the instant case, largely congruent with the two specific exceptions relied upon by the government, it will not for the most part be considered separately. Nevertheless, plaintiffs raise one argument as to the applicability of that requirement that must be dealt with briefly.

Plaintiffs argue that, because the government sought to regulate the pollution problem for their benefit, it may be held liable under the "Good Samaritan" doctrine set out in the *Restatement (Second) of Torts* §§ 323, 324A (1965). That doctrine provides that one who renders services for another or for a third person, in the absence of a duty otherwise to act, may be liable for his failure to exercise reasonable care, where such failure increases the risk of harm to the other party, where reliance is placed upon the actor's undertaking, or where the actor performs a duty owed by the other to the third person. *See, e.g., Zabala Clemente v. United States*, 567 F.2d 1140, 1145 (1st Cir.1977), *cert. denied*, 435 U.S. 1006, 98 S.Ct. 1876, 56 L.Ed.2d 388 (1978).

Bearing in mind that a motion to dismiss will be granted only if it is clear that plaintiff can adduce no set of facts that would warrant a grant of relief, *see Gregg*, 771 F.2d at 547, one could conceive of circumstances that might support plaintiffs' allegation that (1) EPA's failure to exercise reasonable care in carrying out its functions increased the risk of harm to them; that (2) they relied upon EPA to protect them from such harm, or that (3) in undertaking to control the pollution problem, EPA performed a duty that the Dallas area manufacturers owed persons residing near their facilities. Analysis of such claims would require not only the elaboration of a more complete factual record,

but also a review of applicable Texas law. However, the Court is spared that task because, even if plaintiffs could demonstrate the validity of any of the above propositions, their claims would still be barred by the discretionary function and misrepresentation exceptions to FTCA liability. Such a result is certainly not anomalous, for a contrary result would override the specific exemptions enumerated in the Act. *See Zabala Clemente*, 567 F.2d at 1145-46. And as pointed out, *supra* note 4, not all common-law torts, if committed by the government, give rise to liability. Hence, whether the United States could otherwise be held liable under the "Good Samaritan" doctrine is not controlling in the face of specific exemptions from liability.

B. The Discretionary Function Exception

[5] As consistently noted, most recently in *United States v. S.A. Empresa de Viacao Aerea Rio Grandense*, 467 U.S. 797, 808, 104 S.Ct. 2755, 2761, 81 L.Ed.2d 660 (1984) ("*Varig Airlines*"), "[t]he [FTCA] did not waive the sovereign immunity of the United States in all respects, . . . Congress was careful to except from the Act's broad waiver of immunity several important classes of tort claims." One such exception, codified at 28 U.S.C. § 2680(a), provides that the Act does not embrace

> [a]ny claim based upon an act or omission of any employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

As a unanimous Court pointed out in *Varig Airlines*, the "discretionary function exception . . . marks the boundaries between Congress' willingness to impose tort liability upon the United States and its desire to protect certain government activities from exposure to suit by private individuals." 467 U.S. at 808, 104 S.Ct. at 2762. The Court underscored the limited nature of the waiver of sovereign immunity, stressing that the discretionary function exception was meant to exempt from the Act claims arising from the regulatory activities of federal agencies. *Id.* at 809-10, 104 S.Ct. at 2762-63. That exemption was intended to embrace such activities, even where the agency abuses its discretion in carrying out its statutory mandate. *Id.* at 809, 104 S.Ct. at 2762 (quoting Hearings on H.R. 5373 and H.R. 6463 before House Com. on the Judiciary, 77th Cong., 2d Sess. 28, 33 (1942) (statement of Assistant Attorney General Francis M. Shea)).

[6, 7] The Court also took the opportunity to reaffirm the holding of *Dalehite v. United States*, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953), that the exception includes not only the "initiation" of programs or activities, but also "determinations made by executives or administrators in establishing plans, specifications or schedules of operations." 467 U.S. at 811, 104 S.Ct. at 2763 (quoting *Dalehite*, 346 U.S. at 35-36, 73 S.Ct. at 968). The Court went on to enumerate two principles to be used in applying *Dalehite*. First, the rank of the government actor responsible for the alleged misfeasance is not relevant; rather, it is the nature of the conduct in question that governs the applicability of the exception. *Id.* at 813, 104 S.Ct. at 2764. Second, "the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals[,]" *id.* at 813-14, 104 S.Ct. at 2764, are presumptively exempt from liability as a means of "prevent[ing] judicial 'second-guessing' of legislative and administrative decisions grounded

in social, economic, and political policy through the medium of an action in tort." *Id.* at 814, 104 S.Ct. at 2765.

In this proceeding, plaintiffs dispute that the government's conduct involved judgment of a social, economic or political policy nature sufficient to invoke the discretionary function exception. They argue that the decisions made by EPA did not involve policy considerations at all, but rather presented negligent "scientific determinations" that fall outside the discretionary function exception. To support that claim, plaintiffs assert that the discretionary function exception is not applicable where the challenged decision is made at an "operational" rather than a "planning" or "policy" level, citing a number of pre-*Varig* cases.

[8] One such case, upon which plaintiffs principally rely for the proposition that discrete, "objective" scientific determinations may fall outside the exception, *Griffin v. United States*, 500 F.2d 1059 (3d Cir.1974), has been questioned by the court that decided it as being possibly at odds with *Varig Airlines*. *See Smith v. Johns-Manville Corp.*, 795 F.2d 301, 309 (3d Cir.1986); *General Public Utilities Corp. v. United States*, 745 F.2d 239, 246 (3d Cir.1984), *cert. denied*, 469 U.S. 1228, 105 S.Ct. 1227, 84 L.Ed.2d 365 (1985). While not expressly overruled, *Griffin* has been distinguished by the Third Circuit and is of questionable precedential value. *See* 795 F.2d at 309 n. 13; 745 F.2d at 246.

Griffin held that the release of a certain quantity of polio vaccine tested and found unsafe by government standards was an act that was not protected by the discretionary function exception. The Court concluded that "[w]here the conduct of Government employees in implementing agency regulations requires only performance of scientific evaluation and not the formulation of policy, we do not

believe that the conduct is immunized from judicial review as a 'discretionary function.' " 500 F.2d at 1066. When limited to its facts, *Griffin* does not compel a holding that the conduct complained of by plaintiffs in the instant case falls outside the exception. On the contrary, unlike those found actionable in *Griffin*, the acts and omissions charged here comprised the formulation of regulatory policy—whether and to what extent EPA should enforce environmental and health standards. "When an agency determines the extent to which it will supervise the safety procedures of private individuals, it is exercising discretionary regulatory authority of the most basic kind." *Varig Airlines*, 467 U.S. at 819-20, 104 S.Ct. at 2767. Therefore, such acts or omissions cannot give rise to liability under the FTCA.

In a memorandum of supplemental authority, filed upon invitation of the Court, plaintiffs have attempted to rehabilitate *Griffin* or to otherwise demonstrate that it is still good law. To that end, they argue that *Griffin* has been cited with approval in a recent case from this Circuit, *Red Lake Bank of Chippewa Indians v. United States*, 800 F.2d 1187 (D.C. Cir.1986). *Red Lake* cites *Griffin* only for the proposition that actions undertaken outside the scope of an official's authority do not remain within the protections of the discretionary function exception.[6] 800 F.2d at 1196 (citing *Griffin*, 500 F.2d at 1068-69). That rather unexceptional proposition has no bearing on this case. Here, the officials whose acts are complained of cannot be said to have contravened any "mandatory" or "non-discretionary [regulatory]

6. In *Red Lake*, the court held that acts of an FBI agent performed outside his jurisdiction could not be said to fall within the exception; acts undertaken within his sphere of authority were protected. 800 F.2d at 1197-98. Plaintiffs here do not suggest that Dr. Hernandez had no *authority* to make the kinds of decisions that he did; they simply disagree with the conclusions that he reached.

command." *Griffin*, 500 F.2d at 1068. Even if they *abused* the discretion they were bound to exercise, that dereliction would not support an action under the FTCA.

In another authority relied upon by plaintiffs, *Alabama Electric Cooperative, Inc. v. United States*, 769 F.2d 1523 (11th Cir. 1985), the court indicated that it felt that, if limited to its facts, *Griffin* may be consistent with *Varig Airlines*. 769 F.2d at 1529 n. 2. Yet if limited to its facts, *Griffin* is inapplicable to the present situation. As discussed *supra*, the weighing of costs and benefits where concededly permitted is precisely the kind of discretionary function that Congress was seeking to protect. Limited to its facts, *Griffin* merely holds that the failure to carry out a mandatory directive does not involve the exercise of discretion. Similarly, *Alabama Electric* holds that, absent some cost/benefit or policy analysis, the negligent design of a structure by a governmental entity (there, the Army Corps of Engineers) may be actionable under the common-law of engineering malpractice. 769 F.2d at 1534-37. In other words, if a governmental actor deliberately, after weighing the alternatives, decides upon a course of action that injures another, that person has no cause of action under the FTCA. *See id.* at 1534, However, if the actor simply through negligence or oversight does the wrong thing, suit by a person injured thereby will not be barred by the discretionary function exception. *Id.* at 1531-34 (discussing cases).[7]

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7. *Collins v. United States*, 783 1225 (5thCir.1986), also cited by plaintiffs, adds nothing new to the present analysis. There, the court held that a failure to perform a mandatory regulatory action (specifically, the failure to close a mine after levels of methane gas had exceeded critical levels) was actionable under the FTCA. *Id.* at 1230-31. The court also may have to some extent been influenced by plaintiffs' allegations that the actions of the official in question were willful or even criminal, involving tampering with air samples. *See id.* at 1227. The court did note that the official pled guilty to conspiracy to defraud the government. *Id.* at 1227 n. 2.

Recently, the Seventh Circuit applied *Varig Airlines* and *Dalehite* to claims quite similar to those at issue here. In *Cisco v. United States*, 768 F.2d 788 (7th Cir.1985), the plaintiffs brought an FTCA claim for personal injuries and property damage resulting from exposure to dioxin-contaminated soil used as a landfill in Jefferson County, Missouri. They charged EPA with negligence in failing to require that the contaminated soil be removed and in failing to warn of the pollution hazard. Affirming the dismissal of the suit for lack of subject matter jurisdiction, the court reasoned that

> in deciding not to warn Cisco about the contaminated landfill and in deciding not to remove the contaminated dirt from the landfill, the EPA made political, social and economic judgments pursuant to its grant of authority. Cisco may not challenge those judgments under the FTCA because they fall within the discretionary function exception of 28 U.S.C. § 2680(a).

Id. at 789-90.

Other courts addressing similar issues under the FTCA have consistently held that conduct implicating the enforcement of safety or health regulations is exempt from liability to the extent that the government actors are in any way engaged in making policy decisions, broadly construed. *See, e.g., Smith v. Johns-Manville Corp.*, 795 F.2d 301 (3rd Cir. 1986) (no liability for selling surplus asbestos without warranties); *Begay v. United States*, 768 F.2d 1059 (9th Cir. 1985) (no duty to warn uranium miners of safety hazards); *Shuman v. United States*, 765 F.2d 283 (1st Cir.1985) (no duty to warn employees of government contractor of asbestos hazards or to take steps to eliminate them); *General*

Public Utilities Corp. v. United States, 745 F.2d 239 (3rd Cir.1984), *cert. denied*, 469 U.S. 1228, 105 S.Ct. 1227, 84 L.Ed.2d 365 (1985) (no duty to warn of defects in nuclear plant design); *First National Bank in Albuquerque v. United States*, 552 F.2d 370 (10th Cir.), *cert. denied*, 434 U.S. 835, 98 S.Ct. 122, 54 L.Ed.2d 96 (1977) (no liability for improper labeling and registration of fungicide); *In re: Consolidated United States Atmospheric Testing Litigation*, 616 F.Supp. 759 (N.D.Cal.1985) (no Liability for failure to warn of or take steps to minimize hazards surrounding testing of nuclear weapons).[8]

[9] With respect to the actions complained of in this proceeding, EPA similarly had broad discretion in deciding the means by which to manage the pollution problem in Dallas. Although plaintiffs do not cite any statutory authority, other than the Clean Air Act, for the proposition that EPA was under an affirmative duty to protect them from lead pollution hazards, the statutes which in fact govern EPA's conduct offer wide judgmental latitude to the agency in its determination of what, if any, action need be taken in response to a particular environmental concern. The enactment of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, P.L. 96-510, 94 Stat. 2767, *codified at* 42 U.S.C. § § 9601 *et seq.* (1982) ("CERCLA"), provided EPA with authority to "consider," "balance," and "select" a variety of measures in response to a particular environmental contingency. In similar fashion,

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8. Plaintiffs rely heavily on *Allen v. United States*, 588 F.Supp. 247 (D.Utah 1984), where the court held that the discretionary function exception did not bar claims for radiation exposure when the governmental decision-makers did not make studied "eyes open" policy judgments. *Id.* at 329-40. That construction of the exception seems to represent a minority view. *See, e.g., Smith v. Johns-Manville Corp.*, 795 F.2d 208-09. *Allen* is currently on appeal. No. 84-2126 (10th Cir.).

the Resource Conservation and Recovery Act, *codified at* 42 U.S.C. §§ 6901 *et seq.* (1982), provides broad authority to the agency in performing activities affecting hazardous waste management and the manufacture and disposal of chemicals.

Plaintiffs allege that EPA violated statutory duties mandated under the Clean Air Act. The CAA was enacted to protect and enhance the quality of the nation's air resources by, among other things, providing technical and financial assistance to state and local governments in connection with the development and execution of their air pollution prevention and control programs. 42 U.S.C. § 7401(b)(3). The regulatory program established by the CAA places on each state the primary responsibility for assuring air quality within its geographic area by requiring each state to submit an implementation plan specifying the manner in which it will achieve and maintain national air quality standards. *Id.* § 7407. Prior to establishing those air quality standards for a given air pollutant, the Administrator must list the air pollutant as a substance which "in his judgment" may reasonably be anticipated to endanger public health or welfare. *Id.* § 7408(a). Within nine months after the promulgation of a national primary air quality standard, each state is required to adopt and submit to the Administrator a plan which provides for the implementation, maintenance, and enforcement of the primary standard in each air quality control region within the state. *Id.* § 7410(a)(1). The Administrator then has four months from the date required for submission of the state implementation plan to approve the entire state plan or any portion of it, or to disapprove it. *Id.* § 7410(a)(2).

In short, as discussed above, statutes that govern the scope of EPA's activities leave the agency free to exercise its

judgment as to what is the "best course," *Dalehite*, 346 U.S. at 34, 73 S.Ct. at 967, to achieve the goals that Congress has set for it.

[10, 11] EPA's authority to enforce environmental standards generally, or to respond to a particular environmental problem as it arises, did not require the agency to warn residents of local toxic pollution or to have those wastes removed. Congress has left EPA to decide the manner and the extent to which it will protect individuals from exposure to hazardous wastes. Such decisions represent the exercise of "discretionary regulatory authority of the most basic kind[,]" *Varig Airlines*, 467 U.S. at 819-20, 104 S.Ct. at 2767, and, hence, do not give rise to liability under the FTCA.

THE MISREPRESENTATION EXCEPTION

The government contends that even if it misrepresented and failed to warn plaintiffs of the extent of the lead pollution problem it is immune from liability under 28 U.S.C. § 2680(h).[9] Such immunity would bar claims arising out of negligent as well as willful misrepresentation. *United States v. Neustadt*, 366 U.S. 696, 702-07, 81 S.Ct. 1294, 1298-1301, 6 L.Ed.2d 614 (1961).

[12] Plaintiffs assert that the misrepresentation exception is inapplicable in that it applies only to claims arising in a commercial context. It is true that the tort of "misrepresentation" has more often arisen from claimed "invasion[s] of interests of a financial or commercial character, in the course of business dealings." *Neustadt*, 366 U.S. at 711

9. That section has been discussed *supra* note 4.

n. 26, 81 S.Ct. at 1302 n. 26. This general observation, however, does not mean that section 2680(h) has not been applied to actions for personal injuries or property damage based on alleged misrepresentations. Indeed, since *Neustadt* a number of courts have applied the exception to both personal injury and property damage claims. *See, e.g., Baroni v. United States*, 662 F.2d 287 (5th Cir.1981), *cert. denied*, 460 U.S. 1036, 103 S.Ct. 1426, 75 L.Ed.2d 787 (1983) (recovery for property damage barred); *Reynolds v. United States*, 643 F.2d 707 (10th Cir.), *cert. denied*, 454 U.S. 817, 102 S.Ct. 94, 70 L.Ed.2d 85 (1981) (claim for personal injury barred).

In reviewing the scope of the misrepresentation exception, the Supreme Court has indicated that, where the misrepresentations alleged are "not essential" to an otherwise actionable claim, the exception will not bar that claim. *Block v. Neal*, 460 U.S. 289, 296-98, 103 S.Ct. 1089, 1093-94, 75 L.Ed.2d 67 (1983). The plaintiff in *Block* had contracted with the builder for the construction of a house according to Farmers Home Administration ("FmHA") specifications. A FmHA representative inspected the work and reported that it complied with construction specifications. In fact, the workmanship was defective in a number of respects. After the builder refused to cure the defects, plaintiff sued FmHA for the cost of the required repairs. In holding that the claim was not barred by the misrepresentation exception, the Court pointed out that the gravamen of the complaint was not that the plaintiff was misled by the erroneous inspection report, but rather that, after undertaking to supervise the construction, FmHA did so in a negligent manner. The Court thus held that the plaintiff was entitled to attempt to prove at trial facts that would allow recovery

under the "Good Samaritan" doctrine.[10] 460 U.S. at 297, 103 S.Ct. at 1094.

[13] While *Neal* advises caution in dismissing a claim that is not in fact grounded in misrepresentation, the decision does not suggest that, whenever a separate cause of action can be winnowed out from a claim for misrepresentation, that cause of action can be brought under the FTCA. In the instant case, once plaintiffs' claim for misrepresentation is removed, what is left is a claim premised upon a classically discretionary function—a claim that is, therefore, barred under the FTCA. And, of course, plaintiffs are not suggesting that their claim for misrepresentation be disregarded; rather, they rely heavily upon express charges of willful disinformation. To that extent, they seek to bring claims that are clearly excluded by the misrepresentation exception.

Moreover, because plaintiffs' misrepresentation claim is so closely tied to their other allegations, it would be anomalous to hold that a claim may be brought for misinforming persons about the lead pollution problem, but not for mishandling the problem in other respects. Rather, plaintiffs' entire cause of action stems from an activity that Congress believed should not be scrutinized by the medium of a tort action for damages. *Varig Airlines*, 467 U.S. at 809-10, 104 S.Ct. at 2762; *Dalehite*, 346 U.S. at 29-30, 73 S.Ct. at 964-65,

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10. Presumably, oversight of the construction was not considered a discretionary function or otherwise exempted from FTCA liability, and for that reason the Court apparently felt that the "Good Samaritan" doctrine was applicable.

CONCLUSION

The controlling authorities governing the imposition of and immunity from liability under the FTCA clearly command dismissal of this proceeding under the discretionary function and misrepresentation exceptions of the Act, and because the "private liability" requirement has not been met. This is not to say that persons in plaintiffs' position can never achieve redress for a government agency's mishandling of important environmental, health, or safety problems. It is only to say that such redress cannot be achieved by suing the government for damages when it abuses its discretion in regulating the matters entrusted to it. Rather, the appropriate medium for challenging such governmental misfeasance is a suit under the Administrative Procedure Act, *see Smith v. Johns-Manville Corp.*, 795 F.2d at 308 n. 11, or if such a suit would not be appropriate, a petition in Congress. *See Begay*, 768 F.2d at 1066.

An appropriate order will be entered.

ORDER

For the reasons set forth in the Court's **Memorandum Opinion** of this date, it is this 2nd day of February, 1987,

ORDERED

That the defendant's motion to dismiss is **granted** and that the above-captioned matter is **dismissed with prejudice.**

WEST KEY NUMBER SYSTEM

HAZARDOUS WASTE CONTAMINATION OF WATER RESOURCES

(EPA Implementation of the Superfund Program and Lead Pollution Problems in Dallas, TX)

(98-73)

HEARINGS

BEFORE THE

SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT

OF THE

COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION

HOUSE OF REPRESENTATIVES

NINETY-EIGHTH CONGRESS

FIRST SESSION

MARCH 16, 24, 1983

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areas immediately adjacent or near these three lead smelters have extremely high levels of this toxic metal in their systems, and that more than a dozen children in this predominately black, poor subdivision in the Dallas area may have life-threatening levels of lead in their blood; and that a recently released study done by the Center for Disease Control in Atlanta, funded by EPA, shows that while overall test results of the lead blood levels were below the national average, they were 14 percent higher than the norm for the Dallas area.

Now, I have mentioned all of this because, first of all, EPA has known these problems have existed for slightly more than 2 years, and as I understand it, virtually nothing has been done to clean up the lead soil deposits, and only now are the EPA and the State moving to control air emissions from one of the two smelters and to eliminate part of the problem. And according to news accounts, you, Dr. Hernandez, more than 18 months ago, were quoted as saying, "We are proposing some approaches to the lead contamination issue that will be scientifically sound and that will be within the context of practicality of our budgetary restraints." Lead is a very hazardous chemical. It can damage the central nervous system, kidney damage, is known to lower the IQ of children and impede their mental accuity. All this was known 18 months ago, but nothing was done. Why?

Dr. HERNANDEZ. I think a great deal was done on that particular one. First, there was a need to characterize the problem. What we started off with at that time was a lead-in-soil study. We did not have good ambient backgrounds around those areas for the air emissions to tie with that, and we did not have the kind of information needed with

respect as to exposure, to particularly children, but also individuals in that area as a whole. What we really needed was a sampling program where we went out and actually measured people--

Mr. LEVITAS. A sampling of what?

Dr. HERNANDEZ. Blood levels in children, particularly.

Mr. LEVITAS. Why would you need to have that information if you knew what the levels of lead were?

Dr. HERNANDEZ. There is nō a priori lead level in soils that is a prerequisite for some kind of cleanup action. The route of soil led into the body system, the exposure system, is complex, depending on the age of the children, the kind of climate you have, dirt streets versus paved, and as a result we do not have an a priori cleanup level. There is nothing that says, "Here is the place at which you begin to remove soil automatically."

There were some initial things that happened in that case--

Mr. LEVITAS. But before we get away from that, you remember I asked you earlier about reliance on epidemiological evidence as opposed to human test evidence? I am not a scientist, but I have read for years, going back as far as the Rōmans, that people knew that exposure to lead and high quantities of lead had these consequences. High levels of lead were determined to be in place at these three sites in Dallas. Why did we need to take blood levels of these children for 2 years before something was done about cleaning up the mess?

Mr. LEVITAS. All right.

Dr. HERNANDEZ. Mr. Chairman, let me just say the characterization of using the children as guinea pigs is just not fair, and that is not characteristic of what we were doing.

Mr. LEVITAS. I am not suggesting that.

Dr. HERNANDEZ. We were using the best information we had from this team of people looking at the situation.

Mr. LEVITAS. Who made the decision to take the blood tests rather than do the cleanup?

Dr. HERNANDEZ. Well, I do not think there was ever an either/or decision. I think that there was a consistent willingness of one of the companies to do something. Now, whether or not that was total and appropriate or not, the only way you could determine it was by finishing the study process.

Now, I would say you would have a really good point that you could say, "Hernandez, look at these blood levels in these kids. You should have taken action." I do not believe that was the outcome.

Mr. LEVITAS. Dr. Hernandez, you have put your finger on where you and I disagree about this thing. I am suggesting where the Environmental Protection Agency identifies the presence of a potential health hazard in the environment, that the thing to do first is to clean it up, to eliminate the risk.

Is there anybody--

Dr. HERNANDEZ. And I was saying, Mr. Chairman, that there are no magic numbers that you can look for—criteria for lead in soils to make that kind of a decision.

Mr. LEVITAS. Let me make sure I understand your testimony quite clearly. You were unaware that the companies involved, the smelters involved, had negotiated with the regional enforcement people for purposes of cleaning up the soil, removing the soil?

Dr. HERNANDEZ. I was familiar with the fact that at least one of the companies would do something, but the size of that plume, where it was, and how much cleanup was necessary, and under what kinds of situations, was not clear at all. You know, we may have made one of those—let me just give you the other side. Supposing that we had, the first day that report turned up, said, "Let's go and take that playground and clean that place up, and they do this, and say 'Done' and get a settlement out of it," and then we would have been charged with a "sweetheart" deal with somebody, done in the dark of night, before we had done any kind of further study, when in fact, we found that this study showed problems further out.

Mr. LEVITAS. But if you had let them clean it up and not released them from further liability, if they were willing to clean it up, you would have eliminated 18 months of exposure.

Dr. HERNANDEZ. And I do not know that they were ready to take that kind of thing, to do some kind of cleanup and also remain liable. I do not know that.

And listen—I was never informed about that kind of detail on this thing, as to where we were at in that kind of enforcement process.

Mr. LEVITAS. You see, again, it gets back to—let us relate it strictly back to the Superfund situation. One of the concerns that we on this subcommittee have in the philosophy that negotiate first and litigate second has had is it has overlooked completely the purpose of Superfund. You did not need Superfund to negotiate; you did not need Superfund to litigate. Those were there to begin with. Superfund had as its purpose to clean up, clean up the sites, remove the health hazard, and take people out of jeopardy.

Now, here, in the Dallas lead matter, I see a situation—and the reason I am pressing you on this so is that I want to see if we can bring about a change in attitude and philosophy, not just a change in personnel, but a change in attitude and philosophy, which says where you identify the potential of contamination that could potentially pose an imminent health hazard to people, get on with the cleanup and do the scientific blood sampling later on to see how far you have to go, but not to wait 18 months before you do the initial action—particularly in the Dallas situation where, according to the information I have—and I suggest you go back and have someone review the files at headquarters—there was a willingness on the part of the smelters to go forward through a negotiated settlement at their expense.

Now you can respond.

Dr. HERNANDEZ. Let me say that in terms of emergency situations where there is a clear-cut real threat to humans, we do move ahead' we do clean it up. We do not wait. We step forward and do it.

Lead soils, where you do not have an a priori target that says, "This is an emergency," at least at the levels we have been dealing with, "This is an emergency. Move forward with great haste here." You know, if you said, "I want to change your mind about using good information, about collecting

the best information, about looking at exposures," you know, risks to human health are based on two things—one, the presence of a toxic material whose risk we analyze; and the second one is the exposure and the exposure route that you have. And it is through those two processes, neither one independent of the other, that we make our decisions.

And you know, I want to be responsive to you. I want to say, "Yes, we are going to move out there and move forcefully."

Mr. LEVITAS. I understand, and I respect your position on this, Dr. Hernandez. I am just telling you we have a difference of approach in how we ought to deal with this, and I want to explain in a moment how EPA in another circumstance reversed its priorities of timeliness. But please, I want you to finish. I want you to state your position for the record.

Dr. HERNANDEZ. I guess, whether in the absence of any kind of clear-cut criteria for target levels for concern for the presence of a particular chemical in the atmosphere, in our water, that some continuation even for a short period of time would be hazardous—moving ahead without some kind of information as to the nature of the source, the mode of travel, the kinds of control techniques that might otherwise be used, would leave us open to the same kinds of criticisms, "Why did you do that:"

What I am saying to you is that on every one of these cases, we just have to use our best judgment and use our best guess on these things.

Mr. LEVITAS. I would like for you, Dr. Hernandez, to review the files on this matter. I am asking our staff to make arrangements to

Was there a decision made, a policy decision made with respect to that and to the areas related to it?

Ms. PHILLIPS. Dr. Hernandez was concerned about the precedent that cleaning up at an action level of over a 1,000 parts per million would set, not only in the Dallas area, but relative to all the urban areas and lead smelter areas in the country.

He was also concerned that the scientific literature may not support the 1,000 parts per million level. He preferred that we do a health study to determine the action level.

I have to say the the 1,000 parts per million level was one of many levels that were discussed as we tried to determine and action level.

Se we were receiving views from everyone on what was the appropriate level.

Mr. LEVITAS. Dr. Dyer, you are a toxicologist. What is your view of the matter?

Mr. DYER. Based on the literature that we reviewed during this time, I think we had sufficient evidence based on studies conducted by Dr. Carol Angle in Nebraska, Dr. Landrigen, and many others, to indicate that at least 1,000 parts per million should be an action level.

That was the reason for recommending that corrective measures to be taken in those areas having a 1,000 parts per million or more.

Mr. SNYDER. Their April 21 letter was the only thing you had in writing from them: is that correct?

Ms. PHILLIPS. I had two documents in writing. I had the April 21 letter. Then on May 28, I asked the company to submit to me in writing the commitment that they could place into a press release, which they did submit in writing.

Mr. SNYDER. Does that mention the 1,000 parts per million level?

Ms. PHILLIPS. Yes, sir.

Mr. SNYDER. OK. I was just trying to see if they had made a commitment on a thousand.

Ms. PHILLIPS. Yes, sir. They had.

Mr. SNYDER. Thank you.

Thank you, Mr. Chairman.

Ms. PHILLIPS. They had approved the specific language prior to submitting it to Washington.

Mr. SNYDER. You submitted this press release to RSR?

Ms. PHILLIPS. I submitted a draft release to RSR on April 28 and asked them to give back to me not an editing of the press release, but their commitment that could be added to my press release as to what they were willing to clean up to. Yes, sir.

Mr. SNYDER. Thank you, Mr. Chairman.

Mr. MOLINARI. Would you yield?

Mr. LEVITAS. I will be happy to yield. Congressman Molinari has a question at this point.

Mr. MOLINARI. I have a great concern as to the method in which the standard was established. What is general policy with respect to the establishment of a national standard? How does it usually come about?

Mr. Davis.

Mr. DAVIS. For most of the national standards, whether it be under the Clean Air Act, the Resource Conservation and Recovery

Now that information was available to you in region VI, and obviously was available at headquarters well before the end of May and early June 1981.

Mr. DYER. That is correct.

Mr. LEVITAS. Was that part of the basis for your use of the 1,000 parts per million as your standard?

Ms. PHILLIPS. Yes, it was.

Mr. DYER. Yes, it was.

Mr. LIVITAS. Thank you. You see what concerns me—again, I don't understand with all of this background, with what you were finding, why the big slowdown came, and the concern about 1,000 parts per million as being a standard for doing something, rather than going back and having some more blood studies being done before you did anything.

That is my concern. In light of what we know and what the silence was telling us and what headquarters was saying, maybe you can enlighten us on that, Ms. Phillips, or Dr. Dyer.

Mr. DYER. Yes, I would like to make a comment. We were aware of the information that Mr. Janney referred to, and several other articles, that showed the same type of soil/lead relationships.

That was the reason we were very concerned about the situation and recommended the clean up at those levels. So, yes, I agree. And in most cases, as you have pointed out, action is based not on the actual existence of a problem, but, it is based on the potential for a problem.

But in this case we had evidence of human exposure. So we had more information in this situation than we normally have in other enforcement cases.

Mr. LEVITAS. You raise a very important point. Here you had—you say in most cases you take action based upon the potential for health hazard.

Mr. DYER. Right.

Mr. LEVITAS. Here you had a situation where there was not only potential, based upon your soil studies, but actual evidence of exposure to the most vulnerable population, small children.

Mr. DYER. Correct.

Mr. LEVITAS. And you were ready to go forward. Now, was there a shift between the end of May and the first of June in a policy of going forward where there was potential, plus actual exposure, and what came out of headquarters from Dr. Hernandez?

Ms. PHILLIPS. I think I can respond to that. After the press release on June the 1st that had been reviewed by Washington, during that week, approximately June 3, or June 4, somewhere around that time, I did get a call from Dr. Hernandez.

He specifically told me that he had reviewed the literature; that he believed that the thousand parts per million level could not be supported in the literature; that he did not think we should spend any money to remove dirt or have any bulldozers start up until we could identify a specific health problem relative to this case.

He asked us at that time to prepare a status report and options paper to send him on the situation. I went back as a result of that telephone call and talked about the matter with my staff.

My staff was very concerned, I might add, and suggested that I might not have been forceful enough in my discussions with him

what he wanted us to do, and I said, yes, sir, that was the direction that we would go.

Mr. MOLINARI. Was this in the nature of an order?

Ms. PHILLIPS. This was in the nature of a telephone conversation.

Mr. MOLINARI. But didn't he say this is the way we are going to go and that is it?

Ms. PHILLIPS. It was an order to me, yes, sir.

Mr. MOLINARI. It was an order.

Ms. PHILLIPS. I called Dr. Hernandez back after I had gathered the speaking points together and went over, as I recall, from my best recollection, four major points. One of them was a primary concern for the children. I reminded him that this was in a poor area of Dallas, and the region's concerns for the children. Second, I talked to him about, again, what we have been discussing here, what was perceived to be a change of direction at that time in our operations that we had gone from action on a potential health problem to having to prove an actual health problem before we did anything. And I specifically talked about that in relation to the effect this had on present negotiations in other Federal court cases in the region where we were using section 7003 of RCRA and other statutes, and how this could affect our negotiations and how, last, this could affect our futher decisionmaking.

Mr. MOLINARI. All right.

Ms. PHILLIPS. Those were my main points.

Mr. MOLINARI. Did you ever learn why RSR went ahead voluntarily to clean up? Did they communicate their reasons why they did proceed even though there was a holdup on whether they should or not from headquarters?

Ms. PHILLIPS. I think that they had made a corporate commitment and--

Mr. MOLINARI. I understand that, and they are probably to be congratulated for making that commitment. But since there was a holdup and they decided to go ahead, it seems to me that they must have had a judgment that it was the prudent thing to do. I am just wondering if you have any information to share with us as to how and why they made that decision.

Ms. PHILLIPS. Well, when we initially set the 1,000 parts per million as our regional action level, we reviewed with them the literature that we used to come up with that number as a--

Mr. MOLINARI. By them, you mean RSR?

Ms. PHILLIPS. RSR, yes, sir.

Ms. PHILLIPS. And I think that they believed that it was the prudent thing to do.

Mr. LIVITAS. Thank you. I would like to recognize the gentleman from Kentucky at this time. Then we will go around again, because the significance of this change and shift in policy is of deep concern to me, and its implications.

The gentleman from Kentucky.

Mr. SNYDER. Thank you, Mr. Chairman.

Ms. Phillips, you wrote a memorandum to Dr. Hernandez on July 7, 1981, recommending clean up by the companies. That is correct, isn't it.

Ms. PHILLIPS. July 7?

Mr. SNYDER. Yes, ma'am.

Mr. DAVIS. Not to my knowledge.

Mr. SNYDER. Did anybody on your staff indicate an imminent health hazard existed or there was a prosecutable case?

Mr. DAVIS. I would say various members of the staff, including Dr. Dyer, expressed their concern that they felt there was an immediate health hazard. However, the medical people that we were dealing with in EPA, Washington, and subsequently with CDC and the peer review, in both the review of the Dallas report and also in the final report, indicated that there was no indication of lead poisoning. The data that was available had indicated no probability, possibility in their mind for that happening. But you did have lead toxicity, which obviously is of concern.

But I don't think that CDC or the peer group review in either report gave any indication of their feeling of a medical health problem.

Mr. SNYDER. I have been listening a whole lot today. I haven't asked a whole lot of questions until right now. It appears to me that there is perhaps an overriding allegation that Dr. Hernandez's scientific judgments were in error. That seems to be the drift of what I get from the testimony that I have heard thus far.

I want to ask all four members of the panel, aside from that, do any of you have any evidence that there is any, or has been any unholy alliance between Dr. Hernandez and any of the three companies that we have mentioned this morning?

Ms. PHILLIPS. No evidence.

Mr. WHITTINGTON. I don't, sir.

Mr. DYER. I do not.

Mr. DAVIS. I don't.

Mr. SNYDER. Do you have any reason to believe that any actions on his part were based upon anything other than his scientific judgment, even though it may have been in your opinion in error?

Mr. WHITTINGTON. I do not.

Ms. PHILLIPS. I do not.

Mr. DAVIS. No.

Mr. DYER. No.

Mr. SNYDER. Thank you, Mr. Chairman.

Mr. LEVITAS. Thank you, Mr. Snyder.

Just to make the record clear on that point, though--

Mr. SNYDER. Does the chairman want to respond to the question?

Mr. LEVITAS. Yes. In case there is any, in case you want to go beyond that, I am not simply questioning Dr. Hernandez's scientific judgment. I am questioning and challenging his policy judgment and his enforcement judgment, and the change in policy that he brought about as a result of this decision.

Mr. SNYDER. I think all of that has been placed in question. Perhaps what I just said in the area of his scientific judgment was not all encompassing. But to get to the reason for that, I asked the latter two questions. Apparently they believe it was error in judgment on his part in all of the areas that the chairman has mentioned, but based upon anything corrupt between him and any of the three companies. That is the essence I get from the testimony.

Mr. LEVITAS. And I will just say I am not aware of any corruption. I am aware of a policy, as I view it, by Dr. Hernandez and the